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No. 07-853

FILED
MAR 19 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

UNITED ARAB EMIRATES and
THE EMBASSY OF THE UNITED ARAB EMIRATES,

Petitioners,

v.

MOHAMED SALEM EL-HADAD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF

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THE LOWER COURTS HAVE FAILED TO DEVELOP RELIABLE OR CONSISTENT STANDARDS FOR APPLYING THE COMMERCIAL ACTIVITY EXCEPTION TO THE FOREIGN SOVEREIGN IMMUNITIES ACT

Respondent's opposition to *certiorari* rests largely on the assertion that the standards for applying the Foreign Sovereign Immunities Act's "commercial activity" exception to employment disputes are too settled to warrant intervention by this Court. As Respondent sees it, the statute's terms are well defined (or at least broadly understood), the lower courts have adopted a consistent mode of analysis (albeit using varying terminology), and the divergent results reached in the lower court decisions construing the Act can all be attributed solely to nimble judicial treatment of differing facts. Opp'n at 12-13.

The cases simply do not support Respondent's optimistic assessment. As this Court has observed, the statute "leaves the critical term 'commercial' largely undefined." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 612 (1992).[1] Thus, the text of the "FSIA provides

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1. *Accord Holden v. Canadian Consulate*, 92 F.3d 918, 921 (9th Cir. 1996) (turning to legislative history because of the "lack of a clear definition of 'commercial activity'"); *Mukaddam v. Permanent Mission of Saudi Arabia*, 136 F. Supp. 2d 257, 261 (S.D.N.Y. 2001)(court admitting that it had done "its best to define a term as to which Congress gave little guidance"); *see also* Joan E. Donoghue, *Taking The "Sovereign" Out Of The Foreign Sovereign Immunities Act: A Functional Approach To The Commercial Activity Exception*, 17 Yale J. Int'l L. 489, 499-500 (1992) ("FSIA supplies a tautological definition of 'commercial activity' . . . [yielding no] sound basis for determining whether a foreign sovereign state should be immune").

distressingly little guidance" as to how the general rule of immunity and the exception for "commercial activities" can be reconciled. *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1392 (5th Cir. 1985)(statutory text is "circular").

Without meaningful guidance from the text of the statute, some (but not all) courts have turned to "the [equally] troublesome language found in" in the House Report on the bill that ultimately became the FSIA. *Mukaddam v. Permanent Mission of Saudi Arabia*, 111 F. Supp. 2d 457, 465 (S.D.N.Y. 2000). The Ninth Circuit has gone so far as to embrace the House Report as if it *were* the statute:

> [Because of] the FSIA's lack of a clear definition of "commercial activity" . . . [w]e *adopt the standard suggested by the legislative history*. . . .

Holden, 92 F.3d at 921 (emphasis added).

The D.C. Circuit, on the other hand, has resolutely insisted that

> [T]he language that must control our decision is that of the statute rather than of the somewhat muddy legislative history.

El-Hadad I, 216 F.3d at 33.

Although Respondent reassures the Court that FSIA employment cases pose no particular problem for lower courts, these opinions and others expose deep inter-circuit conflict. In the Ninth Circuit, where the language of the *legislative history* controls, immunity attaches *only* if the job performed by the plaintiff-employee fits within one of the three categories specified in the House Report (military, diplomatic, or civil service employment). No other type of employment relationship can qualify for immunity. In the D.C. Circuit, however, immunity is always available if the job at issue fits into one of these categories, but the job need not necessarily fall into one of these categories for immunity to attach.

But the division of authority is much broader even than the foregoing suggests. The D.C. Circuit concluded that, as a matter of law, a foreign nation does not engage in a "commercial activity" when it employs a "civil servant." Pet. App. 9a ("if El-Hadad is civil servant, our analysis stops for we have determined that the U.A.E. is immune from his suit."). The court acknowledged, however, that the "Second Circuit treats the civil service question as quite secondary ('merely [an] example[]' to be used, if at all, only to aid in making the 'central' commercial/governmental distinction')." Pet. App. 10a, *quoting Kato v. Ishihara*, 360 F.3d 106, 111 (2d Cir. 2004). The D.C. Circuit understood what Respondent denies, *i.e.*, that a circuit split exists. Pet App. at 9a ("Not all circuits approach these questions as we do.")

Whether civil service status is treated as conclusive, as in the D.C. Circuit, or is "quite secondary" to the analysis, it is also apparent that the lower courts cannot agree as to what "civil service" means in this context or even agreed upon the source to which one might turn to identify the characteristics of "civil service." Some courts appear to look to the characteristics of civil service as they have developed in *this* country,[2] others seem to defer to the way in which that term is used in the foreign nation at issue.[3] In this case, the immunity question turned in the first instance on the court's conclusion that Respondent was not a civil servant, but that could hardly have been surprising given that "the UAE does not have a [regulatory] definition of 'civil service,' . . . no such designation appears to exist [under UAE law], and . . . the UAE does not distinguish between employees paid by the government by categorizing them as civil service employees, governmental employees, or civilian employees." Pet. App. at 12a-13a.

Moreover, the House Report — elevated to the status of statutory text in the Ninth Circuit and often used as the basis for decision in many other courts — treats the distinction between "clerical" or administrative employees, on the one hand, and "civil service" employees on the other as mutually exclusive characteristics in a binary world: the employment of "clerical" employees, according to the House Report is

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2. *See, e.g., Mukaddam v. Permanent Mission of Saudi Arabia to the United Nations*, 111 F. Supp. 2d 457, 463 (S.D.N.Y. 2000).

3. *See, e.g., Kato v. Ishihara*, 239 F. Supp. 2d 359, 363 (S.D.N.Y. 2002), *aff'd*, 360 F.3d 106 (2d Cir. 2004).

always "commercial," and conversely the employment of "civil service" employees is *always* non-commercial. And yet, as the D.C. Circuit observed below, the "civil service" system in this country *includes* "clerical" and administrative employees. Pet. App. 10a. The House Report's taxonomy simply does not work as a proxy for statutory text. With no answer for this conundrum, Respondent's brief is simply silent on the point.

Similarly, Respondent endorses a mode of analysis based upon a search for "private sector [employment] analogues"; if the work done by the plaintiff-employee is or was "of a character easily found in commercial enterprise," the employment relationship is commercial and no immunity attaches. *See, e.g.*, Opp'n at 26, quoting Pet App. 18a.[4] Respondent, however, does not deal with the indisputable fact that the federal civil service classification system in this country is largely populated with positions that are indistinguishable from every-day private sector jobs. *See* discussion at Pet. 23-24. More tellingly, Respondent is silent as to the undisputed fact that entire civil service classifications are populated with auditors who do work very much like that he performed at the Embassy of the United Arab Emirates.

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4. Respondent claims that this factor is "common to every court's analysis," but that simply is not true. In the Ninth Circuit and the D.C. Circuit, the employment of "civil servants" — however that phrase might be defined — is always immune, even if the job is identical to work found in the private sector. Thus, Respondent's assertion can only be true if the phrase "civil service" is defined to exclude *every* job that is "of a character easily found in commercial enterprise." As explained in the petition, the opposite is true. Pet. 23-24. Respondent is silent on this point as well.

Finally, Respondent endorses the view adopted by some courts that immunity in employment cases ought to be limited to instances in which the plaintiff's job involved "policy making." Opp'n at 24-25. As the petition pointed out, as a practical matter, this would reduce the statutory *general rule* of immunity to a largely irrelevant exception. In most embassies, there are unlikely to be significant numbers of policy-making non-diplomatic personnel; if the *general rule* of immunity is applicable only to those who make policy, the "civil service" aspect of the House Report becomes a dead letter.

To his credit, Respondent does not run from the far-reaching consequences of this position. Rather, he candidly acknowledges that, in his view, the statutory *general rule* of immunity should be applied only in those "rare cases" where the work of the employee at issue "implicate[s] the governmental operations of [the] mission" or Embassy, *i.e.*, where the plaintiff-employee "had [a] role in the creation of government policy" Opp'n at 15, *quoting* decision below, Pet. App. at 18a.

Not surprisingly, the disparate, internally inconsistent, and often conflicting approaches developed in the lower courts have resulted in decisions that cannot be reconciled. Both *Segni v. Commercial Office of Spain*, 835 F.2d 160 (7th Cir. 1987), and *Kato* involved individuals hired by foreign nations to promote their goods in the American marketplace. Neither plaintiff was a U.S. citizen, nor was either involved in governmental policy deliberations, but Segni's employment relationship was commercial; Kato's was not. Although Respondent insists that this difference in outcomes can be attributed entirely to the "fact-bound nature of the commercial activity inquiry," Opp'n at 30, he makes no attempt to

identify *which* differing facts might account for this difference in result. Respondent tells us that these results can be harmonized, but he has not attempted to harmonize them for the Court.

Moreover, even when a plaintiff is held to have been employed in a commercial job, immunity attaches unless the cause of action itself is "based upon" that commercial activity. *Saudi Arabia v. Nelson*, 507 U.S. 349, 351 (1993); *Holden*, 92 F.3d at 920. Thus, as this Court held in *Nelson*, the immunity inquiry requires the court to analyze each of the elements of the plaintiff's cause of action. It is not sufficient for the lawsuit to have some factual connection to the employment relationship; proof of the elements cause of action must require proof of the employment relationship. Respondent again insists that the courts below understand this requirement and therefore that there is no cause for Court intervention. Opp'n at 17 n.7.

Respondent is again mistaken. Consider, for example, the two causes of action at issue in this case, breach of contract and defamation. Although a court might plausibly conclude that the elements of the breach-of-employment-contract cause of action and the facts underlying the "commercial" nature of the employment relationship are sufficiently allied to satisfy the *Nelson* test, the defamation claim would almost certainly require a different outcome. The elements of a claim of defamation do not require proof of an employment relationship. While the facts of his discharge provide the *context* for the statements he claims to have been defamatory, that relationship forms no part of the elements of the cause of action. As *Nelson* explained,

the "only reasonable reading of the [statute] calls for something more than a mere connection with, or relation to, commercial activity." *Nelson*, 507 U.S. at 358.

The court below, however, simply refused to undertake this analysis. It declared that it would "focus [its] commercial activity analysis on the employment relationship between El-Hadad and the U.A.E. embassy as a whole, rather than narrowly on El-Hadad's termination alone or separately on El-Hadad's termination and defamation." Pet. App. at 7a, n.1. The undefined terms of the statute, the "muddy" legislative history, and the lack of guidance from this Court in employment –related FSIA cases lead the court below to misunderstand the nature of its task.

* * * *

This Court and Congress have both recognized "the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 484 (2003), *quoting*, H.R. Rep. No. 94-1487, at 32, *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6631. Indeed, the FSIA was envisioned by Congress to be a remedy for the confusion caused by the pre-existing system for determining sovereign immunity, a system in which "the governing standards [for sovereign immunity] were neither clear nor uniformly applied." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 487-88 (1983).

Congress' legislative "solution" to that problem — the FSIA's general rule of immunity and its "commercial activity" exception — has provided none of the anticipated clarity. Congress expected the courts to develop easily understood standards for identifying "commercial activities" that would provide foreign nations and those with whom they interact a basis for reliably ordering their affairs. The resulting case law, however, is characterized by unpredictability, not certainty; the lower courts are hopelessly confused as to when to apply the general rule and when to apply its exception. Only this Court can provide the needed clarity.[5]

5. Respondent also finds it significant that the United States expressed its views in the district court in *Mukaddam* but failed to do so in this case. Opp'n at 32-3. The United States submitted a brief in *Mukaddam* in response to an explicit request from the district court; no such request was made in this instance. Moreover, the government did not participate in the lower court proceedings in *Nelson* or in *Alfred Dunhill of London, Inc. v. The Republic of Cuba*, 425 U.S. 682 (1976), or in *Weltover*; the Court nonetheless found the issues presented in those cases worthy of review.

CONCLUSION

For the foregoing reasons and those given in the petition, the writ of *certiorari* should be granted.

Respectfully submitted,

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